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IN THE

Supreme Court of the United States

TERM, 1963

No. ~~939~~ 940

L. LLOYD CROSBY,

Petitioner,

v.

THE BRADSTREET COMPANY, and
S. STEWART CROSBY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JAY LEO ROTHSCHILD,
Counsel for Petitioner.

INDEX

	PAGE
The Opinions Below	1
Jurisdiction	2
Questions Presented	2
The Constitutional Provision Involved	3
Statement	3
The Disposition in the Courts Below	6
Reasons for Granting the Writ	7
Prior Restraint Is Not Necessarily A Violation of the First Amendment	9
Even An Illegal Prior Restraint Does Not Render the Decree Void, For There Was, Nevertheless, Jurisdiction to Make the Decree. Since There Was Such Jurisdiction, the 1933 Decree Was Not Void	10
The Merits of the Underlying Decree Were Not Open for Consideration by the Court of Appeals	11
The 1933 Decree Being Valid, the Court of Appeals Should Not Have Lent Its Aid to Stewart Crosby's Malevolent Purpose to Inflict Harm Upon Petitioner, Though In so Doing, He Utilized the Truth	13
Lloyd Crosby Has Standing to Oppose the Motion	13
Conclusion	14
Appendix A Opinion of Judge Sugarman in the District Court	16
Appendix B Opinion of the Court of Appeals	18
Exhibit 1 to Appendix B	23
Appendix C First Amendment to the Constitution	25

CASES CITED PAGE

Adams v. U. S. ex rel. McCann (317 U. S. 269, 273) .. 11
Aikens v. Wisconsin, 195 U. S. 194, 203 13
Alabama Cartage Co. v. Internatl. Brotherhood, etc., 250 Ala. 372, 34 So. 2nd 576 9
American Bank & Trust Co. v. Federal Reserve Bank, 256 U. S. 350, 358 13
American F. of L. v. Swing, 312 U. S. 321 9
American Malting Co. v. Keitel, 209 Fed. 351 [CA 2] 9
Amey v. Colebrook Guaranty Savings Bank (92 F. 2nd 62, 63 [CA 2], cert. den. 302 U. S. 750) 11
Beauharnais v. Illinois (343 U. S. 250, 266) 10
Chaplinsky v. New Hampshire (315 U. S. 568, 572) .. 10
Chicot County Drainage District v. Baxter State Bank (308 U. S. 371) 10
Ex Parte Jackson (96 U. S. 727) 10
Gay v. Parpart, 106 U. S. 679, 699 14
Geneva Furniture Mfg. Co. v. Karpen (238 U. S. 254, 259) 11
Halsted v. Securities & Exchange Commission (182 F. 2nd 660, 668 [D. C. Circ.]; cert. den. 340 U. S. 834 10
Hannegan v. Esquire Inc. (327 U. S. 146) 10
In Re George F. Nord Bldg. Corp. (129 F. 2nd 173 [CA 7]; cert. den. 317 U. S. 670) 7, 8
In Re Schroeder Hotel Co. (86 F. 2nd 491 [CA 7]) .. 8
Joseph Burstyn Inc. v. Wilson (343 U. S. 495, 502-4) 10
Matthews v. Associated Press, etc. (136 N. Y. 333) .. 12
Michel v. Louisiana (350 U. S. 91) 9
Minneapolis-Honeywell Regulator Co. v. Thermoco Inc., 116 F. 2nd 845, 846 [CA. 2] 14

PAGE

Munro v. Bradstreet Co., 170 App. Div. 294 12

Natl. Labor Relations Board v. Columbian, etc. Co., 96 F. 2nd 948, 953 [CA 7], affd. 306 U. S. 292 .. 9

National Labor Relations Board v. Federbush Co. (121 F. 2nd 954, 956) 10

Near v. Minnesota ex rel. Olsen (283 U. S. 697) 7, 10

Nevins, Inc. v. Kasmach, 279 N. Y. 323, 18 N. E. 2nd 294 9

People ex rel. Daily Credit, etc. v. May, 162 App. Div. 215, affd. 212 N. Y. 561 12

Pierce Oil Corp. v. Phoenix Refining Co. (259 U. S. 125, 128-9) 11

Pierce v. Somerset Railway (171 U. S. 641, 648) 11

Poulos v. New Hampshire, 345 U. S. 395, 405 10

Schneider v. State, 308 U. S. 147, 161 9

Shelly v. Kraemer (334 U. S. 1) 7

Sunderlin v. Bradstreet, 46 N. Y. 188 12

Taylor v. Church, 8 N. Y. 452 12

Thomas v. Collins, 323 U. S. 516, 530 8

Times Film Corp. v. City of Chicago, 365 U. S. 43, 47-9 10

U. S. v. Associated Press (52 F. Supp. 362, 374 [S.D.N.Y.], affd. 326 U. S. 1, reh. den. 326 U. S. 802) 9

U. S. v. International Boxing Club, 178 F. Supp. 469, 471 [2nd Circ.] 14

U. S. v. Lorain Journal Co. (92 F. Supp. 794, 801 [D. C., Ohio]; affd. 342 U. S. 143 9

United States v. Nudelman (104 F. 2nd 549, 552 [CA 7]; cert. den. 308 U. S. 589) 11

United States v. Swift & Co. (286 U. S. 106) 8, 11, 14

PAGE

Walling v. Miller (138 F. 2d 629 [CA 8]; cert. den. 321 U. S. 784) 11

Wolf v. Gold, 9 App. Div. 2nd 257 9

Xiques v. Bradstreet, 70 Hun 334, affd. 141 N. Y. 605 12

Yakus v. United States (321 U. S. 414, 444) 9

STATUTE CITED

28 U.S.C., § 1254 (1) 2

RULE CITED

F.R.C.P. Rule 60 (b) (5) (6) 2, 11, 14, 20

IN THE

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No. .....

L. LLOYD CROSBY,

Petitioner,

v.

THE BRADSTREET COMPANY, and S. STEWART CROSBY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered on January 17, 1963.

The Opinions Below

The opinion of District Judge Sugarman (unreported) is printed in Appendix A (*infra*, p. 16). The opinion of the Court of Appeals (as yet unreported [Lumbard, Chief Judge; Moore and Hays, Circuit Judges]), as deleted by it on February 7, 1963,† and the "jurisdiction" order referred to in said opinion [irrelevant on this Petition] annexed thereto as Exhibit 1—is printed in Appendix B (*infra*, p. 18).

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* Nine copies of each of the three Court of Appeals Appendices are submitted herewith. Accordingly, page references, unless otherwise specified, are to: Plaintiff's Court of Appeals Appendix [a]; to Appellee L. Lloyd Crosby's Court of Appeals Appendix [b]; to the Certified Record: [R. p.]. All italics are ours.

† Shown by stricken lines in the Opinion in the Certified Record (R. p. 58a), and in brackets on page 22 *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on January 17, 1963, vacating a decree rendered in 1933 in what appears to have been an action in the nature of libel, originally commenced in the New York Supreme Court, and, by reason of diversity of citizenship, removed to the Southern District of New York (9a). In said action, the plaintiff was S. Stewart Crosby, one of the Respondents herein; and the defendant was The Bradstreet Company, the other Respondent herein (R. p. 5a). The action was settled by a consent decree made in 1933 (R. p. 5a). The judgment of the Court of Appeals, now sought to be reviewed, resulted from an application made by plaintiff, twenty-nine years later, in 1962—pursuant to Rule 60 (b) (5) (6)—to vacate said decree (R. pp. 8a-12a). The district Court denied the application (R. p. 4a). The Court of Appeals thereafter reversed that decision, and granted the application (R. p. 59a). On Appellee, L. Lloyd Crosby's, Petition for Rehearing (R. p. 61a), the Court of Appeals amended its opinion (R. p. 58a)—we assume, in response to our representations—but, on February 11, 1963 (R. p. 73a), denied the Petition for Rehearing. Application for a stay, pending this Court's disposition of this Petition for Certiorari, was denied on March 5, 1963 (R. p. 83a).

Jurisdiction of this Court is invoked under 28 U.S.C., § 1254 (1).

Questions Presented

1.

Should said decree made in 1933, in a libel action brought by plaintiff, S. Stewart Crosby, for his benefit and that of Petitioner, L. Lloyd Crosby, against defendant Bradstreet, but actually prosecuted and financed by plaintiff's brother (Petitioner herein), be said to have been rendered without jurisdiction, and declared void as in violation of the First Amendment to the Constitution of the United States because it restrains defendant (a credit bureau) from disseminating any information with respect to mem-

bers of plaintiff's and Petitioner's family or their business activities (including their misfortunes in criminal proceedings which had been the subject of said libel action); or, on the contrary, when the parties under guidance of L. Lloyd Crosby consented to said decree, did they not waive what might have been their personal rights, under said First Amendment, against "prior restraint", so that said 1933 decree was and is valid?

2.

After a lapse of twenty-nine years, during which the said decree was observed, and plaintiff and Petitioner prospered under its protection, and after a sale, in 1962, to Petitioner, of plaintiff's interests in their common enterprises thus nurtured, and subsequent unfair competition waged by plaintiff against Petitioner, in which campaign the application under consideration was a tactic, should the Court of Appeals, disregarding all intervening equities, and on application of the plaintiff, supported by Bradstreet, and over the opposition of Petitioner, have reappraised the situation, *de novo*, and disregarded the waiver of the First Amendment, accomplished by the parties' consent to the 1933 decree, and thus implemented plaintiff's malevolent purpose to harm Petitioner?

The Constitutional Provision Involved

The said First Amendment involved is printed in Appendix C (*infra*, p. 25).

Statement

We shall refer to the Petitioner herein as Lloyd; to his brother, one of the Respondents herein, as Stanford; to the other Respondent, The Bradstreet Company, as Bradstreet.

Lloyd and other members of his family, including Stanford—then known under their original family name of Grossberg (2b)—were all active in the same business, and, therefore, each was necessarily affected by whatever might

be the esteem in which any one of them was held by the public (10a).

Almost 30 years ago, judgment was entered in the Southern District Court, enjoining Bradstreet from issuing any report or comment as to Stanford, Lloyd, and other members of the family (then all, except for their father, Henry, known under the family name of Crosby [11a]), or as to any of their several corporations (5a-6a). It was stipulated in said judgment that said injunction should operate in favor of all of them, for the "present, past or future". Said judgment was entered on consent.

The injunction concluded an action, in the nature of defamation (in which injunctive relief was asked [20a]), brought against Bradstreet in the New York Supreme Court— and from there removed by Bradsfreet to the District Court (9a)—for publishing libellous misstatements, as to the involvements of Stanford and Lloyd in criminal proceedings which had been tried in the District Court a year earlier, and which had resulted in the acquittal of Stanford, but only in a jury disagreement as to Lloyd, who thereupon, because he could not afford the expense of a new trial, pleaded guilty and received a suspended sentence (20a-21a, 30a).

Said petition for removal and said complaint cannot be found (20a). Accordingly, all that is known as to the nature of the original action, appears from Bradstreet's answer and the affidavits herein. Therefrom, it appears that Bradstreet had *asserted* that it had published a "true" report, except that it said that "The finding of the jury was to the effect that Stanley Grosberg [Stanford] was guilty of fraud" (Answer, par. 13th, 2b).

Lloyd paid all expenses incurred in defending the criminal prosecution, and also those incident to prosecuting the defamation action, which was initiated and concluded under his direction (21a). Stanford himself alleged, in his petition:

> "4. According to petitioner's present recollection, the action was brought at the instance of petitioner's brother L. Lloyd Crosby and the above disposition thereof was

arranged by Mr. Davis also at the instance of petitioner's said brother." (10a)

Thereafter, in 1938, Lloyd organized the Commonwealth Corporations, which engaged in the business of vermin extermination (22a). Under the protection of the aforesaid injunction, the several members of the family worked together and prospered. As Stanford himself alleged in his petition:

"5. For many years thereafter, the petitioner and his said brother were associated together in business and what served petitioner's brother's interest served also the interests of the petitioner." (10a)

Disagreements having arisen between them, on March 31, 1960 Lloyd purchased Stanford's stock interest, for $415,000. In effectuating the aforesaid sale of stock, "No stipulation was made as to the injunction order, because both parties * * * knew and proceeded on the basis that the injunction order would remain in force. There was no suggestion, on either side, that any attempt would be made to vacate that order" (33a).

Lloyd paid $124,000 down, and paid $76,000 more on January 17, 1961. He owed the balance, which he was required to pay in instalments of $2,150 a month—an obligation thus extending over years to come (22a-23a). Lloyd's sources of income from which to make these projected payments were the very corporations in which Stanford had owned the stock he sold to Lloyd.

It is undisputed that approximately three months after the sale aforesaid, and Lloyd's initial payment of $124,000, Stanford went into business under the name "Crosby Exterminating Company", in competition with Lloyd's companies; that Stanford operated from premises on Bigelow Boulevard, Pittsburgh, Pennsylvania—on the same side of the street, just one block away from the premises of Lloyd's companies; that he utilized confidential knowledge which he had acquired when he was with Lloyd; that he raided Lloyd's accounts; copied Lloyd's companies' form of advertisement in telephone directories, and engaged in unfair competition generally (23a).

Thus:

On January 17, 1962, Lloyd paid Stanford $76,000.

In anticipation thereof, and awaiting said payment, Stanford—one week earlier, on January 10, 1962—prepared the petition on his underlying application to the District Court.

On January 19, 1962—two days after Stanford had received said sum of $76,000—the order to show cause on said petition was signed (23a).

In his petition, Stanford asked that the injunction be vacated, ostensibly so that he might have credit reports issued about him and his business. This, notwithstanding that for almost thirty years the brothers had prospered without credit ratings, and that it is a commonplace that many firms do not seek credit, and are not reported in Bradstreet's (34a). Stanford did not deny that credit is quite a negligible feature in the exterminating business; that, with as small an inventory as $3,000, representing supplies, service fees of $600,000 were earned; and that bank credit was and is available (34a). To show that he needed credit, Stanford merely exhibited letters, "taken from my [his] files at random" (27a). "At random" was hardly the appropriate characterization. The letters showed that they were all written to him within a period of three weeks, and involved purchases of $25; $300; $7.20; $56.30 (4b-5b).

The fact is that Stanford's objective was to expose Lloyd to obloquy, in order to wreck Lloyd's business and, thus, to eliminate him as a competitor. For it was only from Lloyd's business that Lloyd could make payments to Stanford.

The Disposition in the Courts Below

In the District Court neither plaintiff nor Bradstreet raised any issue as to the First Amendment. The issue was only as to the equities.

The District Court denied Stanford's application to vacate the 1933 decree, because "the equities require denial of this application", and because the court was "convinced that the harm which will befall L. Lloyd Crosby if the

relief sought is granted by far outweighs the benefits that may accrue therefrom to the plaintiff Stanford Crosby" (R. p. 5a).

It was in the Court of Appeals, that, for the first time, both plaintiff and Bradstreet invoked the constitutional provision, which they had both waived. Only then did they become defenders of the First Amendment.

Disregarding the waiver, the Court of Appeals held that the 1933 decree "was in violation of the First Amendment to the Constitution", which, it held, "limits court action". It did not concern itself with the fact that the stipulation of settlement had the effect of waiving strictly personal rights, which the parties might otherwise have asserted. Nothing in the Court's opinion indicates that it gave heed to this basic proposition.

The Court of Appeals did not reach the question as to whether Lloyd had "standing to oppose" the application (R., p. 58a). He undoubtedly did (see *infra*, p. 13).

Reasons for Granting the Writ

Relying on *Near* v. *Minnesota ex rel. Olson* (283 U. S. 697) and *Shelly* v. *Kraemer* (334 U. S. 1), the Court of Appeals held that the District Court 1933 judgment was void, because it constituted a "prior restraint" of freedom of speech, and of the press. But neither of said cases is applicable. For, even if the First Amendment would otherwise have been applicable, it was waived by the parties. Such is the effect when, as here, a "prior restraint" is the result of a stipulation made in the course of litigation. So it was explicitly held in *In Re George F. Nord Bldg. Corp.* (129 F. 2nd 173 [CA 7]; cert. den. 317 U. S. 670).

Moreover, though the Fourteenth Amendment restrains state courts, the First Amendment restrains only Congress, not federal courts. The right to decide must reside in some superior authority (See *Chicot* case, *infra*, p. 10).

The 1933 decree, being valid, it was error for the Court of Appeals in 1963, to reappraise the situation as if it were still 1933, and to relieve plaintiff and the Bradstreet

Company of their stipulation and the judgment predicated thereon—all in disregard of intervening equities.

Accordingly, the decision in the case at bar is directly in conflict with that in the *Nord* case (*supra*) and with other authorities, including *United States* v. *Swift & Co.* (286 U. S. 106) of which we shall now make exposition.

Protections guaranteed by the First Amendment are quite the same with respect to freedom of the press as they are with respect to freedom of speech. Both are "cognate rights * * * and therefore are united in the First Article's assurance" (*Thomas* v. *Collins*, 323 U. S. 516, 530). Accordingly, the authorities treating of either phase are relevant to the other.

In Re George F. Nord Bldg. Corp. (129 F. 2nd 173 [CA 7]; cert. den. 317 U. S. 670) is in point. In that case, it was argued that an order made by the District Court, on consent, enjoining all persons from sending general written communications to creditors and shareholders of a corporation, could not thereafter be challenged as in violation of the First Amendment. The court said:

> "Furthermore, the right of free speech guaranteed by the Constitution of the United States, Amend. 1, and the Constitution of Illinois, Smith-Hurd Stats., art. 2, § 4, is not an absolute right. It is a relative right that may be modified in its interplay with the rights of others, and it may be waived by the party for whose benefit it was intended. *In re Schroeder Hotel Co., supra*, 86 F. 2nd 491, 494. *Certainly, one who has been a party to a proceeding wherein a consent decree has been entered and who has been a party to that consent, is in no position to claim that such decree restricts his freedom of speech. He has waived his right and given his consent to its limitations within the scope of that decree.*" (p. 176)

So it was also held in *In Re Schroeder Hotel Co.* (86 F. 2nd 491 [CA 7], in which the same question was raised with respect to an order from which an appeal had not been taken. An interesting discussion of the question will be found at P. 494.

It should be noted that, in the *Nord* case (*supra*), those who disobeyed the order were held in contempt; and that, in the *Schroeder* case, an injunction was sustained. That the underlying decree was valid, was thus confirmed.

As illustrated by the cases in which anti-strike agreements have been upheld and enforced (*Natl. Labor Relations Board* v. *Columbian, etc. Co.*, 96 F. 2nd 948, 953 [CA 7], affd. 306 U. S. 292), though, absent an agreement not to strike, the right to strike would be protected (*American F. of L.* v. *Swing*, 312 U. S. 321), such rights, under the First Amendment, are considered to be personal, private, and dispensable by voluntary waiver or equitable estoppel (*Schneider* v. *State*, 308 U. S. 147, 161; *Alabama Cartage Co.* v. *Internatl. Brotherhood, etc.*, 250 Ala. 372; 34 So. 2nd 576; *Nevins, Inc.* v. *Kasmach*, 279 N. Y. 323, 18 N. E. 2nd 294).

As said in *Michel* v. *Louisiana* (350 U. S. 91)—quoting from *Yakus* v. *United States* (321 U. S. 414, 444):

> "'No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right * * * *'" (p. 99).

The cases exemplifying this proposition are legion.

Prior Restraint Is Not Necessarily A Violation of the First Amendment.

The Court of Appeals proceeded on the assumption that a libel may not be enjoined (R., p. 57a). But the very case it cites (*American Malting Co.* v. *Keitel*, 209 Fed. 351 [CA 2]) [R. p. 57a] admits that, under appropriate circumstances, a libel may be restrained; and the New York authorities (applicable in a diversity case, such as this) are to that effect (*Wolf* v. *Gold*, 9 App. Div. 2nd 257).

Moreover, injunctions generally, though involving prior restraint, were sustained in *U. S.* v. *Lorain Journal Co.* (92 F. Supp. 794, 801 [D. C., Ohio]; affd. 342 U. S. 143); *U. S.* v. *Associated Press* (52 F. Supp. 362, 374 [S.D.N.Y], affd. 326 U. S. 1, reh. den. 326 U. S. 802)—a decision of the District Court, composed of three judges, i.e., Learned

Hand, Swan, and Augustus N. Hand, JJ.; *Halsted* v. *Securities & Exchange Commission* (182 F. 2nd 660, 668 [D. C. Circ.]; cert. den. 340 U. S. 834; *National Labor Relations Board* v. *Federbush Co.* (121 F. 2nd 954, 956).

It is, accordingly, settled that the "prior restraint" rule is not absolute, but marked by noteworthy exceptions: *Chaplinsky* v. *New Hampshire* (315 U. S. 568, 572); *Near* v. *Minnesota* (283 U. S. 697, 716); *Joseph Burstyn Inc.* v. *Wilson* (343 U. S. 495, 502-4); *Beauharnais* v. *Illinois* (343 U. S. 250, 266); *Ex Parte Jackson* (96 U. S. 727); *Hannegan* v. *Esquire Inc.* (327 U. S. 146).

Even An Illegal Prior Restraint Does Not Render the Decree Void, For There Was, Nevertheless, Jurisdiction to Make the Decree. Since There Was Such Jurisdiction, the 1933 Decree Was Not Void.

It follows from the foregoing that it may not be said, as it was by the Court of Appeals herein—from the mere circumstance that a prior restraint is decreed as to what an individual may say in the future—that, on its face, that restraint is void by reason of the First Amendment (*Poulos* v. *New Hampshire*, 345 U. S. 395, 405; *Times Film Corp.* v. *City of Chicago*, 365 U. S. 43, 47-9) or that right or wrong, the court was without jurisdiction to order the restraint. As said by this Court in the *Times Film* case:

> "The phrase 'prior restraint' is not a self-wielding sword. Nor can it serve as a talismanic test" (p. 49).

A fortiori, in a case such as this, where the complaint is not available for inspection, and where, therefore, the very basis upon which the court saw fit to approve the stipulation of the parties, does not appear.

Chicot County Drainage District v. *Baxter State Bank* (308 U. S. 371), is in point. In that case, it was held that certain bondholders of a Drainage District, who had been parties to a proceeding, but who did not question the constitutionality of the underlying Congressional statute, were, in a subsequent action, barred—both as to issues decided

by the prior proceeding, and as to those which might have been but were not there tendered. This Court ruled that, irrespective of whether the statute was constitutional or not, the District Court had acted with jurisdiction, for it was that court's duty to determine whether it had jurisdiction, and that "that determination would have been final save as it was open to direct review upon appeal" (p. 378).

To the same effect *Walling* v. *Miller* (138 F. 2d 629 [CA 8]; cert. den. 321 U. S. 784); *Geneva Furniture Mfg. Co.* v. *Karpen* (238 U. S. 254, 259); cf.: *Adams* v. *U. S. ex rel. McCann* (317 U. S. 269, 273); *Amey* v. *Colebrook Guaranty Savings Bank* (92 F. 2nd 62, 63 [CA 2], cert. den. 302 U. S. 750).

The distinction between jurisdiction and even a Constitutional defense, is succinctly made in *United States* v. *Nudelman* (104 F. 2nd 549, 552 [CA 7]; cert. den. 308 U. S. 589), in which the court said:

> "• • • invalidity could not destroy the jurisdiction of the District Court to entertain and adjudicate the condemnation proceedings." (p. 552)

It was accordingly held—citing *Pierce* v. *Somerset Railway* (171 U. S. 641, 648)—that the Constitutional objection might be and was waived.

See, also, *Pierce Oil Corp.* v. *Phoenix Refining Co.* (259 U. S. 125, 128-9).

The Merits of the Underlying Decree Were Not Open for Consideration by the Court of Appeals.

Nor, since the 1933 decree was rendered with jurisdiction, was it permissible, at this remote date—well beyond the "reasonable" limit set by F.R.C.P. Rule 60—for the Court of Appeals to review the merits of the decree earlier made, and thus to ignore the maxim that the doctrine of *res judicata* embodies the mandates of public policy and private peace.

Such is, indeed, the lesson of *United States* v. *Swift & Co.* (286 U. S. 106), i.e., that "the injunction, right or wrong, became the judgment of the Court. • • • We are

not framing a decree. * * * We are not at liberty to reverse under the guise of readjusting" (pp. 117, 119). By that standard, it was inadmissible for the Court of Appeals to adjudicate the present application on the basis of its hindsight view that the decree "should never have been entered in the first place" (Opinion, R. p. 58a).

Nor was the Court of Appeals correct, when it said that the injunction restrained dissemination of information "which the community has the right to know and which Dun & Bradstreet had and has the right to publish" (R. p. 58a).

For that statement assumes what is in issue.

Bradstreet does not serve the public, but only its own subscribers (*Taylor* v. *Church*, 8 N. Y. 452; *Sunderlin* v. *Bradstreet*, 46 N. Y. 188). It is, therefore, not absolutely responsible for the information which it circulates, for it may fall back upon the defense of "privilege" (*Xiques* v. *Bradstreet*, 70 Hun 334, affd. 141 N. Y. 605; *People ex rel. Daily Credit, etc.* v. *May*, 162 App. Div. 215, affd. 212 N. Y. 561; *Munro* v. *Bradstreet Co.*, 170 App. Div. 294). When it chooses not to give information, it may refrain from doing so. *Accordingly, by its consent to the 1933 decree, it agreed so to refrain—nothing at all inconsistent with its practices!* Yet, under the decision of the Court of Appeals, it may opportunistically disregard its contracts and repudiate all equitable principles of waiver and estoppel. For it, the Constitution is a utility, to be used or abused as it sees fit. This, we submit, should not be. It is of no concern to the people of the United States, or to their courts, that individuals agree to forego that upon which they might have insisted. It is of the essence of our democracy that individuals may agree not to do what they are not bound to do. As said by the New York Court of Appeals in the analogous case of *Matthews* v. *Associated Press, etc.* (136 N. Y. 333):

> "The constitutional provision regarding the liberty of speech and of the press has nothing whatever to do with such a provision, and no argument can make it plainer than does the reading of the constitutional provision itself." (p. 342)

Nothing in the Constitution guarantees that one who has waived its provisions, in order to strike a bargain, and buy immunity, may thereafter utilize the Constitution to evade performance of that bargain on his part. It is a commonplace that Constitutional rights may be lost, if not asserted in due time—even if it be only because an attorney omits to recite the magic ritual which the record must contain if the client is to be heard on Consitutional issues. By such waiver, the underlying judgment does not become void, but, on the contrary, may be, and is enforced —though as to another, who has been more alert and insistent on his rights, it may not be.

The principles thus fortified by the authorities, are in accord with elemental concepts of justice. The Constitution shields the citizens of the United States against uninvited transgression of their fundamental rights. It is not a fundamental right of any citizen to induce agreement, and reliance thereon; then to drain its benefits; and then to invoke the Constitution to repudiate what was thus solemnly agreed and thus to utilize it as an instrument to work inequity and exploitation.

The 1933 Decree Being Valid, the Court of Appeals Should Not Have Lent Its Aid to Stewart Crosby's Malevolent Purpose to Inflict Harm Upon Petitioner, Though In so Doing, He Utilized the Truth.

Equity will not tolerate "the doing of a harm malevolently, for the sake of the harm as an end in itself, and not merely as a means to some further end legitimately desired" (*Aikens* v. *Wisconsin*, 195 U. S. 194, 203; *American Bank & Trust Co.* v. *Federal Reserve Bank*, 256 U. S. 350, 358). Yet, that is precisely what the Court of Appeals here did!

Lloyd Crosby Has Standing to Oppose the Motion.

There remains only to consider whether Lloyd Crosby has "standing to oppose this motion * * *" (footnote, p. 935 of Court of Appeals' Opinion, R. p. 58a; *infra*, p. 22). We submit that he has. A beneficiary of a judgment has

standing even to be the moving party (*U. S.* v. *International Boxing Club*, 178 F. Supp. 469, 471 [2nd Circ.]; *Gay* v. *Parpart*, 106 U. S. 679, 699). Lloyd Crosby actually prosecuted the underlying action, engaged counsel, and paid for his services—to protect the family interests, including his own (21a). His was certainly "the laboring oar" (*Drummond* v. *United States*, 324 U. S. 316, 318). So Stewart Crosby himself admits (Petition, par. 4, Appdx. 10a). Accordingly, Lloyd Crosby was bound by the decree which resulted (*Minneapolis-Honeywell Regulator Co.* v. *Thermoco Inc.*, 116 F. 2nd 845, 846 [CA 2]). By the same standard, because he is bound by the judgment, he has status to be heard with reference to it, and to preserve it (cf. *United States* v. *Swift & Co.*, 286 U. S. 106, 113, in which the moving parties were not those in the underlying action). The burden is upon the collaborating S. Stewart Crosby and Bradstreet, to show changed circumstances, making it "*no longer* equitable that the judgment should have prospective application" or "any other reason justifying relief from the operation of the judgment" [Rule 60 (b) (5) (6)], which was entered on their consent. "No longer" has no application to the case at bar. What was agreed in 1933, is even more important in 1963—lest the Court itself be utilized to do inequity. There is no reason to undo what has so well served all concerned. Every consideration—equitable and humane—points the other way. And it is clear that Rule 60 is governed by underlying equitable principles.

Conclusion

The Court of Appeals' decision is in conflict with the decisions of the Seventh Circuit Court of Appeals, and is also in conflict (1) with the general principle that allegedly constitutional rights may be waived, and (2) with applicable pronouncements to the same effect by this Court.

Indeed, the Constitution itself was, in the case at bar, utilized to do inequity.

The basic error responsible for the decision herein is indicated by the deletion which the Court of Appeals chose to make from its opinion, i.e., that the "district court was under a duty to nullify it [the 1933 decree] whenever the order came to its attention". The elimination of that misguided phraseology revealed, but did not exscind the mistaken rationale which spawned it, and which was responsible for the doctrinaire decision. For the 1933 judgment was not void, nor is there any constitutional mandate that individuals may not waive rights which they may otherwise assert. Nor was the Court of Appeals authorized to decide the matter *de novo*. Moreover, Bradstreet, for itself, had the right to waive and did—voluntarily and for consideration—waive what would otherwise have been its privilege of communicating credit information to its private subscribers. And, of course, plaintiff Stanford Crosby, could and did join in that waiver.

It is as important that the Constitution be not invoked to do inequity, as it is that it be enforced to protect essential freedoms. It is submitted that to permit abuse of the Constitution's protections, is to undermine those very guarantees, by diverting them from their dedicated purpose.

It is respectfully prayed that the petition for certiorari be granted.

Dated, March 15, 1963.

Respectfully submitted,

JAY LEO ROTHSCHILD,
Counsel for Petitioner.

APPENDIX A

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

S. STEWART CROSBY, Plaintiff, *against* THE BRADSTREET COMPANY, Defendant.	L. 52, P. 151

Re: S. Stewart Crosby v. The Bradstreet Company
L. 52, P. 151

April 10, 1962

The plaintiff moves to terminate, dissolve and annul the order of this court made on July 8, 1933, which *inter alia* restrained the defendant and its successors from issuing or publishing any report, comment or statement, either in writing or otherwise, concerning the plaintiff, his brother, L. Lloyd Crosby, who opposes the within application, and others, present, past or future. It seems a little late, in fact 28 years too late, for this plaintiff to suddenly become concerned about stripping his brother of the shield which protected his brother in the commercial world from disclosure of certain indiscretions in his brother's past history, when, as is here manifest, the plaintiff himself, as the sole party plaintiff in the instant suit, was the means of shielding his brother since the decree was entered at the plaintiff's behest.

This court's power to amend the order in question resides in F.R.Civ.P. 60(5) and (6). Subdivision (5) of the said rule allows for the relief sought if "it is no longer equitable that the judgment should have prospective application", and subdivision (6) thereof allows for the relief

for "any other reason justifying relief from the operation of the judgment." I read the word "judgment" in both subdivisions (5) and (6) in the context of the entire F.R.Civ.P. 60 to apply with equal force to the "order" herein involved.

This court will not lightly disturb an injunction in existence 28 years, particularly when the pleadings upon which the order of discontinuance and settlement was granted either in original or copy form, are no longer available. From what has been disclosed by the affidavits and memoranda submitted on the within application, I am of the opinion that the equities require denial of this application. I am convinced that the harm which will befall L. Lloyd Crosby if the relief sought is granted by far outweighs the benefits that may accrue therefrom to the plaintiff Stanford Crosby.

Accordingly, in the exercise of discretion, the application is as aforesaid denied.

It is so ordered; no further order is necessary.

s/ SIDNEY SUGARMAN,
U.S.D.J.

Microfilm
April 11, 1962

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 60—October Term, 1962

(Argued October 23, 1962 Decided January 17, 1963)

Docket No. 27606

S. STEWART CROSBY,

Plaintiff-Appellant,

v.

THE BRADSTREET COMPANY,

Defendant-Appellee.

and

L. LLOYD CROSBY,

Appellee.

Before:

LUMBARD, *Chief Judge,*
MOORE and HAYS, *Circuit Judges.*

Appeal from an order of the United States District Court for the Southern District of New York, Sidney Sugarman, *J.*, denying a motion under Rule 60(b) of the Federal Rules of Civil Procedure for relief from an order entered in the same court on July 8, 1933.

Reversed.

COPAL MINTZ, New York, N. Y., *for plaintiff-appellant.*

Appendix B

CHESTER BORDEAU, New York, N. Y. (White & Case, New York, N. Y., on the brief) *for defendant-appellee.*

JAY LEO ROTHSCHILD, New York, N. Y., *for appellee.*

LUMBARD, *Chief Judge*:

Stanford Crosby[1] appeals from the denial by the United States District Court for the Southern District of New York, of a motion under Rule 60(b) of the Federal Rules of Civil Procedure to relieve him from an order entered on stipulation on July 8, 1933. The district judge was of the opinion that the equities required denial of the application as he was convinced "that the harm which will befall L. Lloyd Crosby if the relief sought is granted by far outweighs the benefits that may accrue therefrom to the plaintiff Stanford Crosby." We reverse.

Stanford Crosby and his brother, L. Lloyd Crosby, were indicted by a federal grand jury in 1928 for mail fraud (now 18 U.S.C. § 1341). At trial in 1930, Stanford Crosby was acquitted, but the jury disagreed as to Lloyd Crosby. Lloyd Crosby then pleaded guilty and was given a suspended sentence.

In 1932 The Bradstreet Company, now Dun & Bradstreet, published a credit report which stated that Stanford and Lloyd Crosby had been found guilty of fraud. At that time the two brothers were in business together. In the same year, Stanford Crosby commenced a libel action in the New York Supreme Court against The Bradstreet Company based on the published credit report, which action was removed to the United States District Court. The specific nature of the allegedly libelous statement and the relief sought is unknown as the complaint is unavailable.

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[1] In 1933 Stanford Crosby was using the name S. Stewart Crosby.

We do know, however, that Standford Crosby was the sole plaintiff and Lloyd Crosby and others with whom the brothers were in business, were not parties to the action. On June 28, 1933 Stanford Crosby and Dun & Bradstreet entered into a stipulation wherein the action was settled. The defendant agreed to pay $300 and to "refrain from issuing or publishing any report, comment or statement either in writing or otherwise concerning [Stanford] * * * Crosby, the plaintiff herein, L. Lloyd Crosby [and others] * * * or concerning the business activities of any of the foregoing persons * * *; whether present, past or future." On July 8, 1933 the district court signed an order on that stipulation which was filed on July 10.

Since 1933 plaintiff and his brother have severed business relations and they are now in competing businesses in the Pittsburgh area. Stanford Crosby desires a termination of the 1933 order, under Rule 60(b)(5) and (6) of the Federal Rules of Civil Procedure,[2] claiming that the absence of a listing by the well-known Dun & Bradstreet credit information company makes it difficult for him to get credit. Lloyd Crosby, on the other hand, alleges that Stanford Crosby's purpose is to destroy his business. The defendant, Dun & Bradstreet, opposes termination of the order unless its right to make reference to Lloyd Crosby in its statement about Stanford Crosby is protected.

In memorandum orders dated April 10, 1962, the district court denied plaintiff's motion. On May 11, 1962, 31 days later, in an ex parte proceeding, plaintiff received permission in the district court to file a notice of appeal out of

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[2] "(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: * * * (5) * * * it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment."

time.[3] At the argument before this court, appellee Lloyd Crosby challenged our jurisdiction over the appeal. In an order filed November 14, 1962, we held that, under Rule 6 of the Federal Rules of Civil Procedure, it was "beyond the power of the district court to extend the time of the appellant to file its notice of appeal by ex parte order dated May 11, 1962, if the 30-day period had already expired." However, no file date was stamped on the order and we thought it quite possible that the orders had in fact not been entered by the clerk of the district court until April 11. Accordingly, under Rule 75(h), Federal Rules of Civil Procedure, we directed "that the district court determine the correct date of the entry of the orders dated April 10, and that a supplemental record including these findings be certified and transmitted to this court." The district court has certified that the orders were deposited for filing and entry on April 11, 1962, and accordingly it is clear that the notice of appeal was filed within thirty days. We proceed to the merits.

The 1933 order was extremely broad in its terms. It restrained the defendant from publishing any report, past, present or future, about certain named persons. It is true that the order arose out of a libel action. But even assuming, contrary to authority, *American Malting Co.* v. *Keitel*, 209 Fed. 331 (2 Cir. 1913), that it is proper for a federal court to enjoin a libel, the order here in question was not directed solely to defamatory reports, comments or statements, but to "any" statements. In fact, from all that appears, it would seem that whatever The Bradstreet Company published in 1932 was not libelous as to Lloyd Crosby.

Lloyd Crosby contends that the order was entered on consent and that Bradstreet is bound by contract to refrain from publishing matter about him. We disagree. We are concerned with the power of a court of the United States

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[3] See Rule 73(a), Federal Rules of Civil Procedure.

to enjoin publication of information about a person, without regard to truth, falsity, or defamatory character of that information. Such an injunction, enforceable through the contempt power, constitutes a prior restraint by the United States against the publication of facts which the community has a right to know and which Dun & Bradstreet had and has the right to publish. The court was without power to make such an order; that the parties may have agreed to it is immaterial. [The 1933 injunction is so offensive and so contrary to constitutional mandates that the district court was under a duty to nullify it whenever the order came to its attention.]*

The order dated July 8, 1933 was in violation of the First Amendment to the Constitution, see *Near* v. *Minnesota ex rel. Olson*, 283 U. S. 697 (1931). *Shelly* v. *Kraemer*, 334 U. S. 1 (1948) indicates that the First Amendment limits court action. The order was void, and under Rule 60(b)(4) of the Federal Rules of Civil Procedure, the parties must be granted relief therefrom.

In any event, there does not seem to be any equity in Lloyd Crosby's position since he requests the continuation of an injunction which should never have been entered in the first place.[4]

We reverse the order of April 10, 1962, with directions that the district court nullify the order of July 1933.

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[4] Appellant contends that Lloyd Crosby, appellee, has no standing to oppose this motion because he was not party to the action in 1933. In view of our disposition of the case we do not reach this question.

* [Deleted, as shown in Exhibit 1 annexed to this appendix.]

Exhibit 1 to Appendix B

["Jurisdiction" Order Referred to in Court of Appeals' Opinion]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 60—October Term, 1962

Argued October 23, 1962 Decided November 13, 1962

Docket No. 27606

S. STEWART CROSBY,

Plaintiff-Appellant,

v.

THE BRADSTREET COMPANY,

Defendant-Appellee,

and

L. LLOYD CROSBY,

Appellee.

Before LUMBARD, Chief Judge, MOORE and HAYS, Circuit Judges.

Copal Mintz, New York, N. Y., for plaintiff-appellant.

Chester Bordeau, New York, N. Y. (White & Case, New York, N. Y., on the brief) for defendant-appellee.

Jay Leo Rothschild, New York, N. Y. for appellee.

The appellee, L. Lloyd Crosby, raises on appeal the question of whether the filing of the notice of the appeal

was out of time as not filed within "30 days from the entry of the judgment." Rule 73(a), Federal Rules of Civil Procedure. It appears to us that, under Rule 6 of the Federal Rules of Civil Procedure, it was beyond the power of the district court to extend the time of the appellant to file its notice of appeal by ex parte order dated May 11, 1962, if the 30-day period had already expired. The district court did not find when the order dated April 11 was entered and, because (1) there is no filed date on the orders, (2) the April 10 docket entries followed four April 11 entries, and (3) the New York Law Journal did not report the order until April 12, it seems quite possible that the orders, both dated April 10, 1962, were in fact not entered by the clerk of the district court until April 11. We do not consider the district court's order of May 11 to be a finding as to the date of entry as it appears to be based on an ex parte statement without an examination of the clerk or his records.

Accordingly, under Rule 75(h), Federal Rules of Civil Procedure, we direct that the district court determine the correct date of the entry of the orders dated April 10, and that a supplemental record including these findings be certified and transmitted to this court.

J. EDWARD LUMBARD

LEONARD P. MOORE

PAUL R. HAYS

U.S.C.J.J.

APPENDIX C

First Amendment to the Constitution of the United States

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."